Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprises Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor as third parties)

HIGH COURT (MELAKA) — CIVIL APPEAL NO 22–72 OF 1997
LOW HOP BING J
6 JANUARY 2005

Company Law — Separate legal entity — Lifting veil of incorporation — Intention to defraud — Allegation of engineering fraud through alter ego companies controlled by same director — Whether in interest of justice corporate veil should be lifted

Land Law — Sale of land — Nature of transaction — Whether agreement was for sale of land or merely agreement of guarantee of loan — Whether agreement had come to an end — No documentation of repayment of money owing under agreement by vendor company — Whether vendor had repaid purchaser sum owing

On 20 October 1991, a sand mining agreement over an undivided share of Lot 208 was executed between a wound-up company — Jaytra Sdn Bhd — and the defendant, Hong Huat, wherein an undischarged bankrupt, one Wu Soo Hwa ('Wu') signed for the wound-up company. On 4 December 1992, Wu appointed himself as general manager of the wound-up company, besides appointing himself and his wife Madam Chun (the second third party) as the directors thereof. Although the tribute due to the wound-up company in the sand mining agreement should have been paid to official receiver as the liquidator, it was nevertheless paid to Wu's wife, Madam Chun, as both of them effectively controlled the wound-up company. This sand mining agreement was subsequently held to be invalid and unenforceable. Vide agreement dated 31 May 1993, Airport Auto (the first third party) as agent of Madam Chun purchased, *inter alia*, Lot 208, from the official receiver as liquidator of the wound-up company.

The plaintiff, Golden Vale, was incorporated on 11 September 1993, with Madam Chun as the Managing Director. On 10 June 1993, Airport Auto as beneficial owner of Lot 208 entered into a sale and purchase agreement with Hong Huat ('the sale and purchase agreement') whereby Airport Auto sold the undivided share in Lot 208 to Hong Huat for RM200,000. Although Golden Vale was not a party to the sale and purchase agreement, it was the nominee of Airport Auto. On 9 December 1994, Madam Chun caused Lot 208 to be transferred to Golden Vale. Wu testified that the sale and purchase agreement was a guarantee or security agreement, while the defence witness testified that it was a sale and purchase of the undivided share in Lot 208, and that RM62,000 had been paid as deposit for the purchase from the wound-up company of Lot 208.

A The plaintiff Golden Vale claimed against the defendant Hong Huat for vacant possession and damages for trespass of Lot 208, as well as an account of all the rentals and/or profits derived by Hong Huat during the tenure of its sand mining activities.

B Hong Huat conterclaimed: (1) against Airport Auto for damages for breach of contract and indemnity, interest and costs; (2) against Madam Chun, an order that she do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208 and costs; (3) against Golden Vale, a counterclaim for specific performance.

C Learned counsel submitted for Hong Huat that the real transaction between Hong Huat and Airport Auto concerned the sale and purchase of the undivided share in Lot 208 and not a guarantee or security agreement to recover a loan made by Hong Huat to Airport Auto. On the other hand, learned counsel for all the other parties unanimously contended that the sale and purchase agreement D was actually not a sale and purchase transaction as such, but it was really meant to secure a loan. It was further argued for Airport Auto that the sale and purchase agreement was a conditional agreement and until such time that Airport Auto had acquired the legal and beneficial interest, the sale and purchase cannot be specifically performed, and that it was at an end by reason E of the breach on the part of the defendant in that apart from the deposit of RM62,000, the balance of RM138,000 had not been paid by Hong Huat. It was argued for Golden Vale that the two distinct expressions viz 'amount outstanding from Madam Chun Nyook Lin' and 'commission payable to Mr Heng Weng Loong' used in Exhibit B66, ie the letter from one Hock Seng to Madam Chun F referred to the repayment of one and the only sum of RM282,000, and that Hong Huat's rights, if any, stemming from the sale and purchase agreement had been fully satisfied by such repayment, leaving Hong Huat with no remedy whatsoever against Golden Vale.

G It was argued for Hong Huat that Madam Chun was using Airport Auto and Golden Vale as extensions and corporate veils of herself, while her husband Wu was using his bankruptcy veil in order to defraud Hong Huat and to achieve their unjust personal gains.

H There were two areas of dispute: (1) whether the sale and purchase agreement between Airport Auto and Hong Huat was indeed a sale and purchase agreement; and (2) whether Airport Auto had repaid RM282,000 to Hong Huat pursuant thereto.

I Golden Vale, Airport Auto and Madam Chun as a group of litigants on one side of the fence, and Hong Huat as a party on the opposite side, had decided not to call the most important witnesses, viz Madam Chun and Kwa Cheng Wee respectively to testify in court.

Held, dismissing Golden Vale's claim and allowing Hong Huat's counterclaim:

(1) The court was unable to accept Airport Auto's contention that the sale and purchase agreement was a conditional agreement (see para 28). The intention of the parties viz Hong Huat and Airport Auto as expressed in the sale and purchase agreement was to effect the sale and purchase of the undivided share in Lot 208 (see para 32); *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 followed.

(2) The court accepted the evidence adduced for Hong Huat to the effect that the sum of RM282,000 referred to in B66 and B68 and the sum paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement were for entirely different transactions, which had indeed been confirmed not only by Wu who had testified for Golden Vale, Airport Auto and Madam Chun, but also by consultant engineer Heng Weng Loong who had also testified for Airport Auto (see para 46). If at all Airport Auto had made the repayment, Airport Auto being a company incorporated under the Companies Act 1965 would certainly have documented the repayments in the form of payment voucher or a cheque. The fact that Airport Auto had failed to produce the documents evidencing the payment clearly showed on a balance of probabilities that Airport Auto had failed to discharge the burden of proof in relation to the repayment (see para 47). In the circumstances, the court made a finding of fact that Airport Auto had not repaid Hong Huat the sum of RM282,000 paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement (see para 48).

(3) Madam Chun had played a pivotal role in the execution of the various important documents pertaining to the transfer and sale and purchase of Lot 208 (see para 57). The conduct of Madam Chun both individually and through her husband Wu had been cumulatively designed for the purpose of defrauding Hong Huat, ie to deprive Hong Huat of the rights and interest under the sale and purchase agreement and that would, clearly constitute fraud as defined in s 17(d) of the Contracts Act 1950 (see para 60). In respect of fraud under s 17(d), Hong Huat which borne the burden of proof had discharged that burden to the standard based on a balance of probabilities, ie it was probably true that Madam Chun, through the functionary of her husband Wu and as the alter ego of Golden Vale and Airport Auto, had defrauded Hong Huat (see para 64).

(4) As Madam Chun through her husband Wu had at the material time been in effective control of Golden Vale and Airport Auto which were engineered by them as their extensions to defraud Hong Huat's interest and right under the sale and purchase agreement in relation to the undivided share in Lot 208, in the interest of justice, it was fitting and proper that the corporate veil of Golden Vale and Airport Auto be lifted, as Madam Chun had at all material time been the alter ego of Golden Vale and Airport Auto (see para 65).

[**Bahasa Malaysia summary**

Pada 20 Oktober 1991, satu perjanjian perlombongan pasir di atas Lot 208 telah dibuat di antara syarikat yang telah digulung — Jaytra Sdn Bhd — dan defendan, Hong Huat, di mana seorang yang belum dilepas bankrap, Wu Soo Hwa ('Wu') menandatangan bagi pihak syarikat yang telah digulung itu. Pada 4 Disember 1992, Wu telah melantik dirinya sebagai pengurus besar syarikat yang telah digulung itu, di samping melantik dirinya dan isterinya Madam Chun (pihak ketiga yang kedua) sebagai pengarah-pengarah. Walaupun wang yang perlu dibayar kepada syarikat yang digulung itu di bawah perjanjian tersebut patut dibayar kepada Pegawai Penerima sebagai penyelesai, ianya dibayar kepada isteri Wu, Madam Chun, kerana mereka berdua secara efektifnya mengawal syarikat yang digulung tersebut. Perjanjian perlombongan pasir kemudiannya diputuskan tidak sah dan tidak boleh dilaksanakan. Melalui perjanjian bertarikh 31 Mei 1993, Airport Auto (pihak ketiga yang pertama) sebagai ejen kepada Madam Chun membeli, antara lain, Lot 208, dari pegawai penerima sebagai penyelesai syarikat yang digulung itu.

Plaintiff, Golden Vale, telah ditubuhkan pada 11 September 1993, dengan Madam Chun sebagai Pengarah Urusan. Pada 10 Jun 1993, Airport Auto sebagai pemilik benefisial Lot 208 memasuki perjanjian jual beli dengan Hong Huat ('perjanjian jual beli tersebut') di mana Airport Auto telah menjual Lot 208 kepada Hong Huat untuk RM200,000. Walaupun Golden Vale bukan pihak kepada perjanjian jual beli tersebut, ianya adalah seorang penerima namaan Airport Auto. Pada 9 Disember 1994, Madam Chun telah memindahmilik Lot 208 kepada Golden Vale. Wu memberi keterangan bahawa perjanjian jual beli tersebut adalah satu perjanjian gerenti atau cagaran, manakala saksi pembela memberi keterangan bahawa ianya adalah satu perjanjian jual beli yang menjual Lot 208, dan bahawa RM62,000 telah dibayar sebagai deposit untuk pembelian Lot 208 dari syarikat yang digulung.

Plaintif, Golden Vale menuntut dari defendan Hong Huat milikan kosong dan ganti rugi untuk pencerobohan Lot 208, juga semua sewaan dan/atau keuntungan yang diperolehi oleh Hong Huat sepanjang tempoh kegiatan perlombongan pasirnya.

Hong Huat membuat tuntutan balas: (1) terhadap Airport Auto untuk gantirugi bagi pengingkaran kontrak dan tanggung rugi, faedah serta kos; (2) terhadap Madam Chun, satu perintah bahawa beliau akan membuat Golden Vale memindahmilikan kepada Hong Huat Lot 208 dan kos; (3) terhadap Golden Vale, satu tuntutan balas untuk pelaksanaan spesifik.

Peguamcara yang arif menghujahkan bagi pihak Hong Huat bahawa transaksi sebenar di antara Hong Huat dan Airport Auto berhubung dengan Lot 208 adalah satu jual beli dan bukannya satu perjanjian gerenti atau cagaran untuk mendapat kembali pinjaman yang diberi oleh Hong Huat kepada Airport

Auto. Sebaliknya, peguamcara bagi kesemua pihak lain secara sebulat suara mengatakan bahawa perjanjian jual beli itu bukanlah satu perjanjian jual beli, tetapi sebenarnya ia dibuat untuk mendapat pinjaman. Selanjutnya ianya dihujahkan bagi pihak Airport Auto bahawa perjanjian jual beli tersebut adalah satu perjanjian bersyarat dan sehinggalah bila tiba masa Airport Auto mendapat kepentingan di sisi undang-undang dan kepentingan benefisial, jual beli tersebut tidak dapat dilaksanakan, dan bahawa ianya telah berakhir kerana terdapat pengingkaran dipihak defendan selain dari deposit sebanyak RM62,000, baki sebanyak RM138,000 belum lagi dibayar oleh Hong Huat. Ianya dihujahkan bagi pihak Golden Vale bahawa dua pernyataan yang berbeza iaitu 'jumlah tertunggak dari Madam Chun Nyook Lin' dan 'komisen perlu bayar kepada Encik Heng Weng Loong' di dalam Exhibit B66, iaitu surat dari seorang Hock Seng kepada Madam Chun, merujuk kepada pembayaran balik yang sama, iaitu jumlah RM282,000, dan bahawa hak-hak Hong Huat, jika ada, yang berasal dari perjanjian jual beli tersebut telah dipenuhi dengan pembayaran balik tersebut, yang menjadikan Hong Huat tiada mempunyai remedi lagi terhadap Golden Vale.

Ianya dihujahkan untuk Hong Huat bahawa Madam Chun menggunakan Airport Auto dan Golden Vale sebagai lanjutan dan menyelak tabir pemerbadaan dirinya, manakala suaminya Wu menggunakan tabir kebankrapan untuk memfraudkan Hong Huat dan bagi mencapai keuntungan peribadi.

Terdapat dua isu yang dipertelingkahkan: (1) sama ada perjanjian jual beli diantara Airport Auto dan Hong Huat adalah satu perjanjian jual beli; dan (2)sama ada Airport Auto telah membayar balik RM282,000 kepada Hong Huat sehubungan dengan itu.

Golden Vale, Airport Auto dan Madam Chun sebagai satu kumpulan litigan pada sebelah pihak, dan Hong Huat sebagai satu pihak yang bertentangan, telah memutuskan untuk tidak memanggil saksi yang paling penting, iaitu Madam Chun dan Kwa Cheng Wee untuk memberi keterangan di mahkamah.

Diputuskan, menolak tuntutan Golden Vale dan membenarkan tuntutan balas Hong Huat:

(1) Mahkamah tidak dapat menerima dakwaan Airport Auto bahawa perjanjian jual beli tersebut adalah satu perjanjian bersyarat (lihat perenggan 28). Niat pihak-pihak iaitu Hong Huat dan Airport Auto sebagaimana didalam perjanjian jual beli tersebut adalah untuk membuat jualan dan belian Lot 208 (lihat perenggan 32); *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 diikut.

(2) Mahkamah menerima keterangan yang dikemukakan bagi pihak Hong Huat bahawa wang RM282,000 yang dirujuk di dalam B66 dan B68 dan jumlah yang dibayar oleh Hong Huat kepada Airport Auto di bawah

perjanjian jual beli tersebut adalah untuk transaksi yang berbeza, yang mana ianya telah disahkan bukan sahaja oleh Wu yang memberi bukti bagi pihak Golden Vale, Airport Auto dan Madam Chun, tetapi juga oleh jurutera perunding Heng Weng Loong yang juga memberi keterangan bagi pihak Airport Auto (lihat perenggan 46). Jika Airport Auto telah membuat pembayaran balik, Airport Auto sebagai sebuah syarikat yang ditubuhkan di bawah Akta Syarikat 1965 tentunya telah merekodkan pembayaran balik tersebut dalam bentuk baucar bayaran atau cek. Fakta yang Airport Auto gagal untuk mengemukakan dokumen untuk membuktikan bayaran jelas menunjukkan pada imbangan kebarangkalian bahawa Airport Auto telah gagal untuk melepaskan beban bukti berhubung dengan pembayaran balik tersebut (lihat perenggan 47). Dalam keadaan ini, mahkamah membuat keputusan fakta bahawa Airport Auto tidak membayar balik Hong Huat wang berjumlah RM282,000 yang dibayar oleh Hong Huat kepada Airport Auto di bawah perjanjian jual beli tersebut (lihat perenggan 48).

(3) Madam Chun telah memainkan peranan yang penting di dalam penyempurnaan berbagai dokumen penting berhubung dengan pindah milik dan jual beli Lot 208 (lihat perenggan 57). Perlakuan Madam Chun secara sendiri dan melalui suaminya Wu secara kumulatif direka untuk tujuan memfraud Hong Huat, iaitu untuk merampas hak-hak dan kepentingan Hong Huat di bawah perjanjian jual beli dan ianya jelas adalah satu fraud di bawah s 17(d) Akta Kontrak 1950 (lihat perenggan 60). Berhubung dengan fraud di bawah s 17(d), Hong Huat yang memikul beban bukti telah melepaskan beban tersebut pada tahap berdasarkan imbangan kebarangkalian, iaitu ianya mungkin benar bahawa Madam Chun, melalui suaminya Wu dan alter egonya Golden Vale dan Airport Auto, telah memfraud Hong Huat (lihat perenggan 64).

(4) Oleh kerana Madam Chun melalui suaminya Wu telah pada kesemua masa matan mempunyai kawalan ke atas Golden Vale dan Airport Auto yang ditubuhkan oleh mereka sebagai lanjutan diri mereka untuk memfraud kepentingan dan hak Hong Huat di bawah perjanjian jual beli Lot 208 tersebut, demi keadilan, ianya wajar dan berpatutan untuk menyelak tabir pemerbadanan Golden Vale dan Airport Auto, kerana Madam Chun pada kesemua masa matan adalah alter ego Golden Vale dan Airport Auto (lihat perenggan 65).]

Notes

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 670–692.

For cases on sale of land generally, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3551–4086.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1994] 2 MLJ 180 (refd)
Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)
Armagas Ltd v Mundogas SA; The 'Ocean Frost' [1985] 1 Lloyd's Rep 1 (refd)
Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97 (refd)
Eastern & Oriental Hotel [1951] Sdn Bhd v Ellarious George Fernandez Anor [1989] 1 MLJ 35 (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433 (refd)
Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd [2000] 4 MLJ 737 (refd)
Lim Tat Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 CLJ 316 (refd)
Ong Ban Chat & Ors v Seah Siang Mong [1998] 3 MLJ 346 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (folld)

Legislation referred to

Contracts Act 1950 ss 17, (d), 167, 172
Income Tax 1976

Avatar Singh (Hillary D'Cruz with him) (Mohd Latip & Associates) for the plaintiff.
Wong Kim Fatt (Yong Chen Lim with him) (Yong Chen Lim & Saridah) for the defendant.
Moi Teck Seng (Tan & Yeo) for the first third-party
KP Ng (KP Ng & Amardas) for the second third-party.

Low Hop Bing J:

I PARTIES

[1] This is a multipartite civil action, involving:

(1) Plaintiff:	Golden Vale Golf Range and Country Club Sdn Bhd ('Golden Vale')
(2) Defendant:	Hong Huat Enterprises Sdn Bhd ('Hong Huat')
(3) Third party 1:	Airport Auto Centre Sdn Bhd ('Airport Auto')
(4) Third party 2:	Madam Chun Nyook Lin ('Madam Chun')

II SUBJECT MATTER

[2] The subject matter herein concerns 4/10 undivided share ('the undivided share') in a piece of land known as Lot 208 held under Grant No 4749, the

whole land measuring in area 105.96 acres, in the mukim of Batang Melaka, district of Jasin, state of Melaka ('Lot 208').

III CLAIMS AND COUNTERCLAIMS

[3] Golden Vale's claims against Hong Huat are for vacant possession and damages for trespass of Lot 208, as well as an account of all the rentals and/or profits derived by Hong Huat during the tenure of its sand mining activities. Hong Huat claims:

(1) against Airport Auto for damages for breach of contract and indemnity, interest and costs;

(2) against Madam Chun, an order that she do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208 and costs;

(3) against Golden Vale, a counterclaim for specific performance.

IV HOBSON'S CHOICE

[4] Before I embark on the finding of facts and the rest of my judgment, it is perhaps pertinent for me to point out that Golden Vale, Airport Auto and Madam Chun as a group of litigants on one side of the fence, and Hong Huat as a party on the opposite side, have either intentionally or unintentionally decided not to call the most important witnesses viz Madam Chun and Kwa Cheng Wee respectively to testify in court in order to enable or assist me in arriving at the true position surrounding the transactions which have now apparently turned sour or fallen apart.

[5] Given this backdrop, it appears that I have been left with Hobson's choice ie to avail myself of the second best evidence adduced from non-parties and to do my utmost to judicially appreciate the evidence, both oral testimony and contemporaneous documents, adduced and produced in these proceedings, for the purpose of discovering where the truth lies in this particular case.

V DECISION SOUGHT

[6] The sale and purchase agreement executed between Airport Auto and Hong Huat dated 10 June 1993 is the agreement on which the decision of this court is sought as to whether Airport Auto and Madam Chun had breached it.

VI FINDING OF FACTS

[7] After conducting a full trial, I now set out my finding of facts.

[8] On 9 May 1988, Jaytra Sdn Bhd had been wound up by an order of the High Court ('the wound-up company').

[9] On 20 October 1991, a sand mining agreement was executed between the wound-up company and Hong Huat, wherein an undischarged bankrupt, one Wu Soo Hwa @ Ngo Sur Hua ('Wu') signed for the wound-up company.

[10] On 4 December 1992, Wu appointed himself as general manager of the wound-up company, besides appointing himself and his wife Madam Chun as the directors thereof. Wu had also filed a false declaration in Form 48A dated 3 December 1992 in which he had stated that he was not an undischarged bankrupt, notwithstanding his capacity to the contrary.

[11] Although the tribute due to the wound-up company in the sand mining agreement should have been paid to official receiver as the liquidator, it was nevertheless paid to Wu's wife, Madam Chun, as both of them effectively controlled the wound-up company. This sand mining agreement is invalid and unenforceable: see the judgment of Siti Norma Yaakob JCA (now FCJ) in *Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd* [2000] 4 MLJ 737 at p 741E. All the parties herein have referred to this authority wherein the Court of Appeal and the High Court had dismissed Hong Huat's application for mandatory injunction.

[12] Vide agreement dated 31 May 1993, Airport Auto as agent of Madam Chun purchased, *inter alia*, Lot 208, from the official receiver as liquidator of the wound-up company, the vendor, with the concurrence of the chargee, Bank Utama.

[13] Golden Vale was incorporated on 11 September 1993, with Madam Chun holding one of the two shares as director in 1993, 1994, 1 October 1995 and also as at 30 September 1996. In 1997, after the transfer on 18 July 1994 of Lot 208 to Golden Vale, she bought 49,999 shares so as to maintain her controlling interest of 50,000 shares out of the 100,000 shares issued in Golden Vale. Effectively, all the shares are within her family and her control as the managing director.

[14] On 10 June 1993, Airport Auto as beneficial owner of Lot 208 entered into a sale and purchase agreement with Hong Huat ('the sale and purchase agreement') whereby Airport Auto sold the undivided share in Lot 208 to Hong Huat for RM200,000. Both the sale and purchase agreement and Airport Auto directors' resolution for the sale and purchase thereof dated 10June 1993 were signed by Madam Chun. The directors' resolution referred to the same transaction ie the sale and purchase agreement for the sale and purchase of the undivided share in Lot 208 for a consideration of RM200,000 which had been fully paid by Hong Huat, with an excess sum of RM82,000, amounting to RM282,000.

[15] Clauses 20 and 21 of the sale and purchase agreement are succession clauses which bind Airport Auto and its successor in title ie Golden Vale.

[16] Although Golden Vale was not a party to the sale and purchase agreement, it is the nominee of Airport Auto, as averred in para 23 of Madam Chun's defence. Golden Vale is Madam Chun's nominee and Airport Auto is Madam Chun's agent.

[17] On 9 Dcember 1994, Madam Chun caused Lot 208 to be transferred to Golden Vale which Madam Chun controlled and accepted the transfer in Form 14A as a director of Golden Vale (paras 9 and 10 of Airport Auto's defence).

[18] As alluded to above, Madam Chun did not give evidence as a witness, but her husband Wu gave evidence to the effect that he was acting on his wife's behalf and with her consent, knowledge and authority.

[19] Wu testified that the sale and purchase agreement was a guarantee or security agreement, but DW1 Kwa Soon Seng ('DW1 Kwa') (to distinguish it from Kwa Cheng Wee who is a non-witness) testified that it was a sale and purchase of the undivided share in Lot 208, and that RM62,000 had been paid to Bank Utama as deposit for the purchase from the wound-up company of five pieces of land, one of which was Lot 208.

[20] Madam Chun also signed the accounts of Golden Vale and Form 34C evidencing the charge on Lot 208, for the benefit of another company known as Jati Erat Sdn Bhd.

[21] There are however two areas of dispute here viz:

(1) Whether the sale and purchase agreement is indeed a sale and purchase agreement, which involves a question of mixed law and fact; and

(2) Whether Airport Auto has repaid RM282,000 to Hong Huat pursuant thereto, which involves a question of fact.

[22] My specific finding in relation to these two areas of dispute will appear later in this judgment.

VII REAL TRANSACTION

[23] Learned counsel Dr Wong Kim Fatt, assisted by Mr Yong Chen Lim, submitted for Hong Huat that the real transaction between Hong Huat and Airport Auto concerns the sale and purchase of the undivided share in Lot 208 and not a guarantee or security agreement to recover a loan made by Hong Huat to Airport Auto.

[24] On the other hand, learned counsel for all the other parties herein viz for Golden Vale, Mr Hillary D'Cruz together with Mr Avatar Singh; for Airport Auto, Mr Moi Teck Seng; and for Madam Chun, Mr KP Ng unanimously contended that the sale and purchase agreement was actually not a sale and purchase transaction as such, but it was really meant to secure a loan.

[25] It was also submitted for Golden Vale that the court is generally not bound by the label attached to a document, relying on *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; and that the words used in the sale and purchase agreement did indicate the ultimate intention of the parties.

[26] It was further argued for Airport Auto that the sale and purchase agreement was a conditional agreement and until such time that Airport Auto had acquired the legal and beneficial interest, the sale and purchase cannot be specifically performed, and that it was at an end by reason of the breach on the part of the defendant in that apart from the deposit of RM62,000 which did not work out to be the conventional 10% deposit in a sale and purchase agreement, the balance of RM138,000 has not been paid by Hong Huat, as no mention was made of the advances of RM282,000 made towards the purchase price.

[27] The additional point taken for Madam Chun is that a sum of RM282,000 inclusive of RM62,000 had been advanced by Hong Huat to Airport Auto between 2 October 1992 and 5 July 1994, and that the advance of RM62,000 vide UMBC cheque No 634907 dated 10 October 1992 was made as payment to Bank Utama being 1% deposit or earnest money for the purchase price of RM6.2 million for five pieces of land, including Lot 208, on condition that upon completion of the purchase, Airport Auto was to sell Lot 208 to Hong Huat for RM500,000 which was different from the sale and purchase of the undivided share in Lot 208 for RM200,000 which Hong Huat has never paid to Airport Auto.

[28] I am of the view that the answer to the diametrically opposite contentions may be found in the Court of Appeal judgment in *Hong Huat Enterprise* where at p 742 E–I Siti Norma Yaakob JCA (now FCJ) adverted to the sale and purchase agreement as specifically for Lot 208, adding that it was not disputed that Hong Huat had also paid the balance sum in full. I am therefore unable to accept Airport Auto's contention that the sale and purchase agreement was a conditional agreement. Further at p 748 E–G, Abu Mansor JCA (later FCJ) also referred to the effect of the sale and purchase agreement in which Airport Auto would sell and transfer the undivided share in Lot 208 for the sum of RM200,000.

[29] In addition to the above findings of the Court of Appeal, there are before me other oral and documentary evidence from which the intention of the parties in relation to the real transaction may be further ascertained. I shall evaluate the oral evidence and construe the contents of all the documents executed by the parties thereto. One such document is obviously the 'director's circular resolution' of the vendor, Airport Auto, which was signed by Madam Chun contemporaneously with her execution of the sale and purchase agreement. That resolution has expressly stated, inter alia, that 'the company sells 40% of all that pieces (sic) of land known as Lot 208'.

[30] The sale and purchase agreement and the resolution must be evaluated in conjunction with Wu's evidence in which he had admitted that the sale and purchase agreement was for the sale and purchase of the undivided share in Lot 208.

[31] I shall now consider the judgment of the Court of Appeal in *Sia Siew Hong* delivered by Gopal Sri Ram JCA and cited for Golden Vale, Airport Auto and Madam Chun. There, a document entitled 'Guarantee for debts' contained a deeming clause to make the appellants 'principal debtors'. Such deeming provision was held by the Court of Appeal to point to the document being an indemnity rather than a guarantee. The learned judge of the Court of Appeal made it abundantly clear that in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document, and that the clear duty of the court is 'to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport'.

[32] I hereby apply the principles enunciated in *Sia Siew Hong* and hold that in a nutshell, the findings of the Court of Appeal in *Hong Huat Enterprise* manifested through the aforesaid two Court of Appeal judges, together with the directors' resolution of Airport Auto and Wu's admission left me with no doubt that the intention of the parties viz Hong Huat and Airport Auto as expressed in the sale and purchase agreement is to effect the sale and purchase of the undivided share in Lot 208.

VIII REFUND OF RM282,000?

[33] It was submitted for Hong Huat that the evidence of DW1 Kwa shows that Airport Auto the vendor has never refunded the sum of RM282,000 to Hong Huat, and that Madam Chun had paid RM282,000 to one Hock Seng Mining Sdn Bhd ('Hock Seng') as commission for the sale of her 60% shares in Airport Auto to Gombak Land Sdn Bhd ('Gombak Land'), which was a separate transaction involving a separate company and is not an issue before the court.

[34] It was argued for Golden Vale that the two distinct expressions viz 'amount outstanding from Madam Chun Nyook Lin' and 'commission payable to Mr Heng Weng Loong' used in exh B.66 ie the letter from Hock Seng to Madam Chun referred to the repayment of one and the only sum of RM282,000, and that Hong Huat's rights, if any, stemming from the sale and purchase agreement have been fully satisfied by such repayment, leaving Hong Huat with no remedy whatsoever against Golden Vale.

[35] In relation to the sum of RM282,000, Airport Auto contended that it had repaid it in full by way of set-off from the sale of Madam Chun's shares in Airport Auto to Hock Seng as outlined in the memorandum from one CYWong to one Peter Yip with a carbon copy to one Kwa Cheng Wee who

was dealing with Wu and that the RM282,000 did not represent the reduced commission of RM500,000. Coincidentally, Madam Chun shares this submission also.

[36] I shall refer to the Court of Appeal judgment in *Hong Huat Enterprise* where Siti Norma Yaakob JCA (now FCJ), at p 742I, said that it was not disputed that in addition to the deposit of RM62,000, Hong Huat has also paid up the balance of the purchase price in full amounting to RM282,000.

[37] The evidence of DW1 Kwa was that Airport Auto has never refunded the RM282,000 to Hong Huat. Wu's evidence (adduced for Airport Auto and Madam Chun) confirmed that Airport Auto had no document such as payment voucher or cheque to show the refund of this sum to Hong Huat.

[38] In the light of the conflicting evidence, I will have to analyse the entire oral evidence adduced in the trial and test it against contemporaneous documents in order to arrive at the truth and formulate my specific finding of facts.

[39] This approach has been enunciated by the Supreme Court in *Eastern & Oriental Hotel [1951] Sdn Bhd v Ellarious George Fernandez Anor* [1989] 1 MLJ 35 at p 37 (SC), where Wan Hamzah SCJ (as he then was) in delivering the judgment of the Supreme Court agreed with the soundness of the observation made in *Armagas Ltd v Mundogas SA; The 'Ocean Frost'* [1985] 1 Lloyd's Rep 1 which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[40] A similar sentiment was expressed by Siti Norma Yaakob JCA (now FCJ) and Haidar Mohd Noor JCA (later CJ (M)) in delivering the judgments of the Court of Appeal in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; and *Lim Tat Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 CLJ 316, respectively.

[41] The evidence adduced before me included exh C45 ie the letter dated 4 December 1993 written by Madam Chun's husband Wu to DW1 Kwa, wherein Wu has agreed to pay a commission of RM500,000 to DW1 Kwa upon completion of sale through Hock Seng of Madam Chun's 60% shares in Airport Auto to Gombak Land pursuant to the agreement dated 21 January 1993 executed between Madam Chun and Gombak Land. One Heng Weng Loong, a consultant engineer was a witness for Airport Auto. He testified to such commission and that he had agreed to reduce his commission from RM220,000 to RM200,000.

[42] Hock Seng is not a party in the suit before me. It seems to me that Hock Seng is a different company having separate and distinct transactions with Wu, and that such commission had been reduced to RM282,000.

[43] Exhibit B66 (which is also exh C64) dated 8 March 1995 is the memorandum from one CY Wong to one Peter Yip, with a carbon copy to one Kwa Cheng Wee in relation to the subject matter of the sale and purchase of 20% Airport Auto shares between Hock Seng and Madam Chun, wherein item (a) referred to, *inter alia*, the payment of the amount of RM282,000 outstanding due to Hock Seng from Madam Chun, as it has been deducted from the figure of RM595,000.

[44] Subsequently, Hock Seng in a letter dated 13 March 1995 in exh B68 addressed to Madam Chun had confirmed, *inter alia*, that there was no commission payable by Madam Chun to Hock Seng in connection with the purchase of the 60% equity of Airport Auto by Gombak Land.

[45] Wu in his evidence agreed that the sum stated in B66 (which is also C64) and the sum paid by Hong Huat to Airport Auto were entirely two different transactions.

[46] In the light of the above evidence which had been tested against contemporaneous documents, I accept the evidence adduced for Hong Huat to the effect that the sum of RM282,000 referred to in B66 and B68 and the sum paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement were for entirely different transactions, which had indeed been confirmed not only by Wu who had testified for Golden Vale, Airport Auto and Madam Chun, but also by consultant engineer Heng Weng Loong who had also testified for Airport Auto.

[47] If at all Airport Auto had made the repayment, Airport Auto being a company incorporated under the Companies Act 1965 would certainly have documented the repayments in the form of payment voucher or a cheque as Airport Auto has to prepare annual statutory accounts under Part VI Division I ss 167 to 172 of the Companies Act 1965 and the relevant provisions of the Income Tax Act 1976. The fact that Airport Auto has failed to produce the documents evidencing the payment clearly shows on a balance of probabilities that Airport Auto has failed to discharge the burden of proof in relation to the repayment.

[48] In the circumstances, it is my specific finding of fact that Airport Auto has not repaid Hong Huat the sum of RM282,000 paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement.

IX LIFTING THE CORPORATE VEIL

[49] It was argued for Hong Huat that Madam Chun was using Airport Auto and Golden Vale as extensions and corporate veils of herself, while her husband Wu was using his bankruptcy veil in order to defraud Hong Huat and to achieve their unjust personal gains. *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (SC); and *Abdul Manaf Mohd bin Ghows*

& Ors v Nusantara Timur Sdn Bhd & Ors [1994] 2 MLJ 180 (HC) were cited in support of this contention in order to show that Madam Chun was the alter ego of Airport Auto and Golden Vale, with her husband Wu as the mastermind, and that Hong Huat has discharged the burden of proving civil fraud on a balance of probabilities, referring to s 17 of the Contracts Act 1950; *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 (FC); and *Ong Ban Chat & Ors v Seah Siang Mong* [1998] 3 MLJ 346 (CA).

[50] In response, Golden Vale also relied on *Aspatra* and *Abdul Manaf* but argued that the Court of Appeal judgment in *Hong Huat Enterprise* has ruled that the sale and purchase agreement has created no rights in favour of Hong Huat.

[51] Golden Vale further contended that vide agreement dated 21 December 1993, Madam Chun had divested herself of 60% of her shareholding in Airport Auto in favour of Gombak Land pursuant to two agreements both dated 13 March 1995, whereby Hock Seng had acquired a total of 20% of Airport Auto from Madam Chun, who in December 1994 was no longer in control of Airport Auto, but Gombak Land was, and that any allegation of fraud against Madam Chun would be on shaky ground.

[52] It was argued for Airport Auto that there was no basis for Hong Huat's counterclaim for specific performance against Airport Auto as agent for Madam Chun and that Airport Auto was under no obligation to effect the transfer of the undivided share in Lot 208 to Hong Huat.

[53] The stand taken for Madam Chun was that at all material time during the negotiations leading to the sale and purchase agreement, Hong Huat was fully aware that Madam Chun and Wu were in control of Airport Auto, in which case, the issue of lifting the corporate veil to reveal the alter ego of Airport Auto did not arise as the veil was never put on in the first place, and so the issue of civil fraud by Madam Chun did not arise.

[54] It was also canvassed for Madam Chun that the evidence of DW1 Kwa should be rejected as it is inconsistent with contemporaneous documents in particular B66 and B68, seeking support in *Eastern & Oriental Hotel*, *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob,* and *Lim Tat Ming & Sons Credit Sdn Bhd v Lim Tuck Thien*.

[55] At this juncture, it is appropriate for me to refer to some fundamental principles under this head. In *Aspatra* one Lorrain exercised effective control of the appellant companies and one of the questions before the Supreme Court was whether Zakaria Yatim J (later FCJ) was correct in lifting the corporate veil so that Lorrain was the alter ego and the assets of the companies were held or deemed to be the assets of Lorrain. The majority judgment of the Supreme Court delivered by Mohamed Azmi SCJ (as he then was) held that

A the learned first instance judge was correct in lifting the corporate veil, as the court would generally do so in order to do justice particularly when an element of fraud was involved eg in the receipt of secret profits whatever might be the capacity in which Lorrain had received them.

B **[56]** In *Abdul Manaf*, Anuar J (later CJ (M)) explained at pp 2111 to 2112 that because a company has a legal personality and a separate legal entity of its own distinct from its members or directors, there have been and will be instances where its members or controllers hide behind its corporate entity or are otherwise hidden from the view or shielded by what has come to be described as its corporate veil to manipulate it fraudulently for unjust personal C gains, and that in such an exceptional case, the court, in order to do justice, will not hesitate to lift the corporate veil by cutting across the legal boundary of corporate structure in order to see the faces and discover the true identities of these members or controllers who use the company as an extension of themselves and make them personally liable or responsible for the debts and D liabilities of the company where the evidence justifies such a remedy.

[57] I shall now revert to my finding of facts as narrated above, specifically the fact that Madam Chun has played a pivotal role in the execution of the following important documents:

E (1) the agreement dated 31 May 1993 for Airport Auto as purchaser;

(2) the sale and purchase agreement for Airport Auto as vendor;

(3) the directors' resolution of Airport Auto;

(4) the transfer form in Form 14A for Golden Vale;

(5) Form 34C evidencing the charge on Lot 208; and

F (6) Golden Vale's accounts.

[58] It is also significant to note that in the Court of Appeal judgment in *Hong Huat Enterprise* at p 742I Siti Norma Yaakob JCA (now FCJ) stated that interestingly when Airport Auto did not exercise the final option to repurchase, G Jaytra (wound-up company) through Madam Chun and her husband Wu had transferred the whole of the land to Golden Vale despite the order of the court dated 12 February 1993.

[59] Further, Madam Chun, as a director of both Airport Auto and Golden Vale, accepted the transfer of Lot 208 to Golden Vale which then charged H Lot208 to BSN Commercial Bank (M) Sdn for the benefit of another company Jati Erat Sdn Bhd, thereby distancing the land from Hong Huat.

[60] In my view, the abovesaid conduct of Madam Chun both individually and through her husband Wu had been cumulatively designed for the purpose of defrauding Hong Huat ie to deprive Hong Huat of the rights and I interest under the sale and purchase agreement and that would, clearly constitute fraud as defined in s 17(d) of the Contracts Act 1950 which, where relevant, merits reproduction as follows:

'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto:

(a) …

(b) …

(c) …

(d) any other act fitted to deceive.

[61] 'Fraud' within the ambit of s 17(d) is not criminal fraud but civil fraud for which the standard of proof is that applicable in civil cases ie on a balance of probabilities.

[62] Section 17 was considered by the Federal Court in *Ang Seng Hiok* where Mohamed Azmi FCJ (as he then was) held, *inter alia*, that where the allegation of fraud was purely civil in nature, the civil standard was applicable.

[63] Mokhtar Sidin JCA who delivered the judgment of the Court of Appeal in *Ong Ban Chai* at p 358 B–G applied the same principle.

[64] In the instant case, I am of the view that in respect of fraud under s17(d) above, Hong Huat which bears the burden of proof has discharged that burden to the standard based on a balance of probabilities ie it is probably true that Madam Chun, through the functionary of her husband Wu and as the alter ego of Golden Vale and Airport Auto, has defrauded Hong Huat.

[65] As Madam Chun through her husband Wu had at the material time been in effective control of Golden Vale and Airport Auto which were engineered by them as their extensions to defraud Hong Huat's interest and right under the sale and purchase agreement in relation to the undivided share in Lot 208, I hold that in the interest of justice, it is fitting and proper that the corporate veil of Golden Vale and Airport Auto be lifted, which I hereby do, and that Madam Chun had at all material time been the alter ego of Golden Vale and Airport Auto.

XI CONCLUSION

[66] On the foregoing grounds, I hold that Golden Vale has failed to prove its claim against Hong Huat on a balance of probabilities. Hence, I dismiss Golden Vale's claim with costs.

[67] I also hold that Hong Huat has proved its claim against Airport Auto on a balance of probabilities, for which I give judgment in terms as adumbrated above, with a consequential order that damages be assessed by the learned registrar of this court. Hong Huat is also awarded interest at 8% per annum on the damages, from the date of judgment to the date of realisation.

[68] As against Madam Chun, I make an order that Madam Chun do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208.

[69] I also allow Hong Huat's counterclaim against Golden Vale.

[70] Finally, I also order that taxed costs be borne and paid by Golden Vale, Airport Auto and Madam Chun to Hong Huat.

Plaintiff's claim dismissed. Defendant's counterclaim allowed.

Reported by Loo Lai Mee